Cases and Materials for LAW 249HF

The Role of Courts in a Democracy

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Introduction

Canadians who read the newspapers or watch the nightly news can be forgiven for thinking that the Supreme Court of Canada has taken over governing the country. Since the entrenchment of the Charter of Rights and Freedoms and Aboriginal rights in 1982, the Court has decided controversial case after controversial case. One need only think of decisions striking down abortion laws; extending gay rights; giving tobacco companies the right to advertise; requiring warrants and right to counsel warnings and excluding relevant evidence if they are not present and decisions recognizing Aboriginal land and treaty rights. These cases make good news because they seem to produce clear winners and losers. The media does not always have the time or inclination to present the rationales or nuances found in the Court's lengthy judgments or to follow through on their implementation. In many high profile cases, the Court has recognized new rights for less than popular individuals and minorities and placed new obligations and restraints on governments. On decision day, the Supreme Court by definition has the last word.

The Supreme Court may appear not only to be governing, but like many other governments, to be under siege. Canada's two national newspapers and Her Majesty's Loyal Opposition, the Reform Party/Canadian Alliance, have all featured concerns about "judicial activism" in their platforms. Recent debates have been driven by neo-conservative or right of centre concerns that the courts are too solicitous of the rights of criminals and minorities. Prior debates, however, have featured arguments from the left that the courts have protected the rights of corporations and other powerful interests. Thoughtful and distinguished Canadians who helped frame the Charter such as Allan Blakeney, the former New Democratic premier of Saskatchewan, and Peter Lougheed,

the former Conservative premier of Alberta, have joined together to express concerns about the growth of judicial power. They have called for increased use of the power to enact legislation notwithstanding Charter rights in order to assert "the supremacy of elected people as distinguished from appointed judges" and to "develop some creative tension between the legislatures and the courts when they courts are moving into areas which have been the traditional preserve of the legislatures."[1] Former Minister of Justice John Crosbie has similarly warned that the Supreme Court has "utilized the provisions of the Charter to elevate themselves above the two other branches of government" so that Parliamentary supremacy has been replaced by judicial supremacy.[2] The Court has responded to these and other criticisms by reminding the politicians that they entrenched the Charter and that they have ample opportunities to respond to its decisions. Both Chief Justices Lamer and McLachlin have made headlines by expressing concerns to the press about "court bashing" and to deny claims that the Court has "hijacked by interest groups".[3]

The debate over judicial activism that rages today is influenced by partisan and ephemeral concerns, but it also raises important and enduring issues. The role of courts as un-elected and independent institutions presents dilemmas in any democracy. It raises fundamental questions of political and legal theory. The Americans have grappled with the "counter majoritarian difficulty"[4] of judicial review for over two centuries. They have devoted the most energy into thinking about how judges should decide cases; how they

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[1] "Ex-premiers call for the use of charter's 'safety valve'" National Post March 1, 1999. The first quote is from Lougheed and the second from Blakeney.
[2] Richard Gywn "If there is anarchy today, the Supreme Court has to take responsibility for that" St John's Telegram Oct. 12, 1999 p.6.
[3] Kirk Makin "Lamer Worries About Public Backlash" *Globe and Mail* Feb 6, 1999 A1; Luiza Chwialkowska "Rein In Lobby Groups, Senior Judges Suggest" *National Post* April 6, 2000 A1.

should be appointed and what effect their decisions should have on other branches of governments. The American judiciary, which has at various times constitutionalized slavery, apartheid, *laissez faire* economics, and abortion policy and has dismantled public segregation hardly seems like the "the least dangerous branch"[5] that the framers believed it would be. The American experience with judicial review is well known to Canadians and has shaped our own debates about judicial activism.

Judicial review, however, is no longer only an American game. Since the end of World War II, many other countries in both their domestic and international laws have joined Canada in adopting a bill of rights that can be enforced by the judiciary. The Canadian Charter reflects this modern international experience as much, if not more, than the 18th century American experience. When enacted in 1982, the Canadian Charter was unique in allowing governments to justify reasonable limits in legislation on all rights and to enact legislation notwithstanding certain Charter rights. The latter override provision has been the most controversial, causing Prime Minister Mulroney to claim that it rendered the Charter "not worth the paper it was written on"[6]. The former limitation provision has, however, been the most important both in Canada and abroad where it has been adopted in other countries such as Israel, New Zealand and South Africa. The Charter is more relevant in Jerusalem, Auckland and Johannesburg than Washington. Unfortunately, too much of the Canadian debate about judicial activism remains mired in the deep tracks and dead ends of the American debate.

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[4] Alexander Bickel *The Least Dangerous Branch The Supreme Court at the Bar of Politics* 2nd ed (New Haven: Yale University Press, 1986) at p.16.
[5] *Federalist 78*
[6] Hansard 1989? At 154.

The Charter, like Canadian federalism, is an experiment that has attracted international attention and admiration. Canadians must continue to work out the appropriate and constructive balance between the role of legislatures and courts. We may be losing sight of the genius of the Canadian system which gives **both** judges and legislatures robust roles in determining the way rights are treated in our free and democratic society. Too much fear of courts may deprive judges of their ability to make us aware of the effects of governmental actions on fundamental values and the rights of minorities. Too much faith in courts may make us unable to correct the mistakes that judges, like other human beings, will inevitably make.

I am concerned that there has so far been more heat than light in public debates about judicial activism. Critics of judicial activism have often trivialized the reasoning and limited law making power of the courts and ignored the many options that legislatures have to respond to most Charter decisions. Defenders of the courts have often focussed on the excesses of the critique, downplayed the reality of judicial mistakes and relied on the positivistic and unsatisfying defence that the politicians should not complain because they gave judges the power that they now exercise. The debate has been plagued by hyperbole on both sides. The Charter is neither an invention akin to "the invention of penicillin and the laser"[7] nor one that has destroyed Canadian democracy so that "a Speech from the throne cannot be properly interpreted until one has heard the 'Speech from the Bench'".[8] The judicial activism debate deserves better than inflated rhetoric that both sides in the heat of battle have exchanged.

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[7] Chief Justice Antonio Lamer as quoted in F.L. Morton and Rainer Knopff *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at p.13.
[8] Preston Manning *Strong Roots Bright Future* Reply to the Speech to the Throne October 1999 at p.12.

Both sides in the current judicial activism debate are creating some dangerous illusions. The critics of the Court create the illusion that some groups – "Charter Canadians"[9] or "the Court Party"[10] if you will – are protected by courts. As a lawyer who sometimes represents such groups, I only wish it were so easy. The Supreme Court, which has generally been more receptive to rights claims than other courts, itself rejects two thirds of all Charter claims it hears.[11] As Alan Cairns has observed, some minorities may be able to attach themselves to themselves to specific rights in the Charter, but others cannot. In every case, governments and majorities can attach themselves to s.1 of the Charter which allows reasonable limits to be placed on rights. Even in the third of cases in which our highest Court finds that the government has unjustifiably infringed rights, its decisions may very well not be the last word.[12] Judicial wins can easily turn into political defeats and vice versus. There is already plenty of "creative tension" between courts and legislatures. It is a mistake, either for those sympathetic or hostile to particular Charter claims, to think that courts always recognize and vindicate rights or that when they do recognize rights, they necessarily has the last word. The rights of minorities and the unpopular are far more fragile than suggested by either side of the judicial activism debate. One of the greatest dangers of judicial review may be the idea that we can rely on the courts to protect rights.

This book joins the ongoing debate about judicial activism and argues that the extent of judicial activism in Canada has been seriously exaggerated. Ultimately,

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[9] Alan Cairns *Reconfigurations* (Toronto: McClelland and Stewart, 1995) c.4.
[10] F.L. Morton and Rainer Knopff *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000)
[11] Kelly in recent Osgoode Hall L.J
[12] Current academic debate places the number of replies to court decisions invalidating legislation under the Charter between two and one thirds of all cases. See infra c.6 for an evaluation of this debate.

however, I hope to move beyond the judicial activism debate by suggesting that the structure of the Canadian constitution makes even arguably activist judicial decisions a legitimate but not final contribution in an enriched and energetic democratic debate between courts and legislatures about how we will treat rights in our free and democratic society. Although concerns about judicial activism are sometimes raised in contexts such as civil litigation[13], I will focus on the role of the Supreme Court of Canada, in interpreting the Canadian Charter of Rights and Freedoms (the Charter) and Aboriginal and treaty rights. The term judicial activism unfortunately often goes undefined. It has been used by both the left and the right and it has meant different things to different people at different times. Concerns about judicial activism were born in the United States and I will suggest that the Canadian debate about judicial activism has been decisively and wrongly shaped by the distinctive American experience. Those who criticize courts for engaging in judicial activism often make implicit, but controversial assumptions about the democratic and judicial processes. It is much easier to be concerned about judicial activism if you believe that democracy should be a matter of implementing the majoritarian will or recognizing the supremacy of the legislature. Similarly concerns about judicial activism will be heightened if you believe that judging is a matter of discovering a determinate and pre-existing law or vindicating rights at all costs. Conversely, judicial activism emerges as a less of a problem if you conceive democracy as not simply majoritarian, but pluralistic and respectful of minority rights and if judging

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[13] Interestingly, those who raise concerns about excessive civil litigation in Canada, like those who raise concerns about Charter activism, often ignore important structural differences between American and Canadian law. In Canada, as almost everywhere else in the world, the losing party in civil litigation must pay a significant amount of the costs incurred by the winner. The American rule of no costs shifting, combined with the heavy use of contingency fees, can make even unsuccessful litigation almost costless. See Roach and Trebilcock "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall L.J 461.

is understood as inevitably involving some measure of creativity. This book will unpack the many meanings of judicial activism and identify the assumptions that underlie the judicial activism debate.

Those who argue about judicial activism make not only normative claims about what the courts ought to be doing, but empirical claims about what the courts are actually doing. This book will address whether Canadian courts are actually engaging in judicial activism by the way they interpret the Charter and by the effects of their Charter decisions on legislatures and the executive. My approach will not be a quantitative one[14] which attempts to provide a scientific measure of activism but a qualitative one which focuses on the Court's major decisions in a wide variety of constitutional contexts[15] and what is known about the effects that they have had on governments and society. Quantitative analysis can be useful, but the issue of whether courts are usurping democracy is far too value laden to be resolved by a battle over numbers. Unlike some others, I will focus not only on the minority of cases in which the Court finds an unjustified Charter violation, but also the effects of decisions that uphold legislation and executive actions as "Charter proof".

Finally, I will outline what I believe is necessary to move forward beyond the present debate about whether there is judicial activism and whether judicial activism is a bad thing. The path forward in my view requires the dismissal of the extreme positions

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[14] For discussion of the percentage of Charter decisions that result in legislative replies as well as controversy over whether the dialogue is positive or negative see Peter Hogg and Allison Bushell "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't a Bad Thing After All" (1997) 35 Osgoode Hall L.J. 75; Christopher Manfredi and James Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513; Peter Hogg and Allison Thorton "Response"

[15] I have previously examined important Charter decisions and legislative replies in the important context of criminal justice in my *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) esp chs.2-6.

advanced by both the critics and the defenders of the Court and careful attention to the structure of the Canadian constitution. On the one hand, the critics of judicial activism overstate their case when they allege the Charter has given judges a blank cheque and replaced legislative supremacy with judicial supremacy. Judges are constrained by the texts they interpret, the cases that are litigated and the requirement that the rights they recognize be balanced with other rights and social interests. Judges make binding decisions on the parties, but the long term effects of their Charter decisions are subject to modification and reversal by the legislature. Even if the s.33 override is not used frequently, legislatures have not been shy about modifying and even reversing Supreme Court decisions by ordinary legislation that can be defended as a reasonable limitation under s.1 of the Charter on the rights that the Court has recognized.

At the same time, defenders of the Charter and the Court overstate their case to the extent they suggest that judges can be guided by any determinate theory that produces right or final answers in difficult cases. Judges can legitimately reach a number of different results and take a number of different approaches to constitutional interpretation. The freedom that our judges have and the fact that they are human mean that judicial mistakes, sometimes serious mistakes, will be made. This leads us away from conventional theories of judicial review which all aim to produce judges who get it right to theories which presume that judges will sometimes get it wrong and which accordingly focus on the ability of legislatures to reply to judicial decisions. This way forward from the judicial activism debate requires us to understand the past and to see the Charter, not so much as a revolution, but as a continuation and enrichment of the ability of courts and legislatures to engage in dialogue under the common law. In many fields,

especially Aboriginal, administrative and criminal law that now account for most Charter litigation, judges have traditionally initiated a dialogue with the legislature in which they stressed the importance of the values and procedures of a common law or judge-made bill of rights.[16] Under the Charter, judges continue to exercise considerable creativity, but they are at least guided by an authoritative text. When judges invent the common law or interpret statutes in light of common law presumptions, they did not necessarily have the final word. The legislature could correct judicial mistakes by enacting and being held accountable by the people for legislation that clearly altered the common law. The same is true under the Charter. Judicial mistakes under the Charter can still be corrected by legislatures exercising their power to enact new legislation and justify its limits on the rights found by courts. To be sure, the requirement that governments justify violations of the rights found by the courts is more rigourous than before the Charter, but in most cases courts do find that governments have justified limitations on rights. In addition, legislatures retain the power they had under the common law to avoid the process of justification by enacting legislation notwithstanding many of the rights contained in the Charter.

My conclusion that the Charter is not fundamentally different from the common law will be disquieting to both sides in the judicial activism debates. Critics of the Court and the Charter will be reluctant to see the Charter as a continuation of a common law tradition that they believe is consistent with majoritarian democracy and limited judicial

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[16] In 1938, John Willis observed that the various common law presumptions applied by the courts "form a sort of common law 'Bill of Rights' or 'ideal constitution'...Although English and Canadian courts have not the power of the Supreme Court of the United States to check the activities of legislatures, the combined use of the four presumptions does go some distance to establishing a sort of fourteenth amendment to the British North America Act." John Willis "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1 at 17, 23. See infra c.9.

law making. Defenders of the Court and the Charter will be reluctant to admit that we have not traveled so far from the common law heritage that many believed gave inadequate protection to the rights of minorities and the unpopular. For better or worse, our common law Constitution and the power that it gives legislatures in their dialogue with the courts will not save us from ourselves.

My Approach

Although the judicial activism debate deserves more reflection, it is a debate and all of its participants including myself bring certain values and concerns to the table. I have already confessed my sometimes membership in the so-called Court Party that engages in Charter litigation, but do not believe that this disqualifies me from contributing to the debate. Those who represent groups before the Court are in a good position to understand how they are treated before the Court and the effects of judicial decisions on those they represent. I know how difficult litigation can be and how hard-won judicial victories can turn into legislative or administrative defeats. As a former clerk at the Court, I might be thought by some to be an apologist for its work. It is not a bad thing to be able to vicariously step into the shoes of the Justices who must justify the difficult decisions they make under the glare of scrutiny and criticism from the press and law reviews. In any event, any fears that I will be too soft on the Court should be rebutted by the fact that as a law professor, I earn my livelihood by criticizing the Court both in the classroom and in the law reviews. If the Court made no mistakes, professors such as myself would be out of business.

I take a new legal process approach which critically examines the dynamic roles of judges, legislators and bureaucrats and thus does not focus on judicial decisions as the

inevitable end point of legal disputes. Judges can and do make mistakes and the judicial activism debate is in part a discussion about judicial mistakes and how they may be repaired. At the same time, however, legislatures and bureaucrats also make mistakes and I believe that the courts have a role in responding to those mistakes, at least when they adversely affect fundamental values and the rights of minorities. I approach the judicial activism debate with the assumption that all branches of government will make mistakes. My legal process approach disposes me to examine judicial decisions as only the start of a process which allows for responses by legislatures, the executive and society. I am attracted to dialogic theories of judicial review if only because they do not assume that judicial decisions are self-executing or the final word. My prior work has concluded that the Supreme Court has frequently not had the last word on Charter matters affecting the criminal justice system and that Parliament has frequently been apply to reply quickly and effectively to the Court's decisions. Judicial activism has been matched by legislative activism.

Finally, I am concerned that critics of judicial activism on both the left and the rights have lost sight of the differences between the Charter and the Parliamentary system in comparison with the American Bill of Rights and the Congressional system of governance. As a modern rights protection instrument, the Charter is fundamentally different from the 1791 American Bill of Rights. Most notable, is the recognition in s.1 of the Charter that legislatures can place reasonable limits on rights if they are demonstrably justifiable in a free and democratic society. Canadian governments have more weapons when they defend laws from judicial review and they have more options when Courts strike down the laws. The Canadian Parliamentary system also allows the Cabinet or

indeed even the inner Cabinet[17] to respond more quickly and decisively to judicial decisions than is possible under the American system of divided power between legislative bodies and the executive. In Canada, judicial activism can be quickly and efficiently matched by legislative activism. It is only natural that the judicial activism debate in Canada has been influenced by American debates, but ultimately it must respect important legal and political differences that still exist between the two countries. My analysis of dialogic forms of judicial reviews that promote a common law-type conversation between courts and legislatures may also have relevance in other countries that have a Parliamentary system and bills of rights with limitations clause, but again attention must be paid to the particular constitution, as well as local legal and political cultures.

Outline of the Book

This book is divided into three main parts. The first part, consisting of the first three chapters will address the vexed and often unanswered question of what is judicial activism. The second part consisting of the next three chapters and forming the heart of the book will address the extent of judicial activism in Canada. Finally, the third part of the book and the last three chapters will attempt to move beyond the judicial activism debate by critically assessing the premises of the Court's critics and defenders and offering a new conceptualization of judicial review in Canada that places judicial activism into the context of a continuing dialogue between courts and legislatures that is not fundamentally different than that traditionally used to develop the common law and interpret statutes in light of common law presumptions.

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[17] Donald Savoie *Governing From the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

As will be discussed in the first chapter, debates about judicial activism have been strongly shaped by the American experience of judicial review both with the respect to the *Lochner* era in which the Court blocked progressive reforms that culminated in the New Deal and the civil rights era in which the Court prohibited segregation in *Brown v. Board of Education,* protected the rights of the accused, women and others. Although the Supreme Court of Canada has sometimes gone beyond even the Warren Court in protecting the rights of the accused and the rights of some minorities, this does not necessarily produce the same concerns that have haunted Americans about judicial activism. As discussed in chapter one, after some initial doubts, the Americans have settled on a model of judicial supremacy which gives judges the last word on matters of constitutional rights. Unlike in Canada, constitutional decisions in the United States can only be reversed by the extraordinary process of constitutional amendment and the uncertain process of judicial appointments. The American model of judicial supremacy helped plunged that country into Civil War after the Court constitutionalized slavery in the infamous *Red Scott* case. In Canada, our Court explicitly disclaimed the illusion of judicial supremacy or the notion that rights and the law were an absolute trump over the democratic process in its famous *Quebec Secession Reference*. Even when the Courts reach similar decisions, they are different because of the American tradition of judicial supremacy and the Canadian tradition of democratic dialogue between courts and legislatures and creative compromise as recognized in ss.1 and 33 of the Charter.

The second chapter will examine the judicial activism debate as it has evolved in Canada. Concerns about judicial activism in Canada are not new. They were first expressed in the 1930s as the courts struck down the Canadian version of the New Deal

and the Social Credit experiment led by "Bible Bill" Aberhart and Ernst Manning. They continued to be expressed in conservative quarters in Quebec in the 1950s as the Supreme Court enforced civil liberties against Maurice Duplessis's government. The first two decades of the Charter has seen a startling evolution of the debate about judicial activism that has mirrored but fast forwarded over 70 years of American experience. Starting with Premier Blakeney's resistance to the Charter without an override, the 1980's saw a sophisticated critique of the Charter and judicial activism conducted by academics on the left. With a few post-modern spins, they played out the progressive critique of the *Lochner* Court and had a considerable influence in restraining the Court's initial enthusiasm for the Charter. In the 1990's, the place of the left as the premier critics of the Charter has been taken by the right and social conservatives who are concerned that a "Court Party" of post materialistic elites has captured the Court and used litigation as a means of advancing claims that would not have been accepted by the legislatures. Just as the left critique was haunted by the ghost of *Lochner*, the right critique has played out Warren Court anxieties right down to criticism about young radicals who act as law clerks to the Justices of the Supreme Court and a theory of adjudication based on discovery of the framers's intent. The often implicit reliance by left and right critics of judicial activism on American analogues is unfortunate. It is an example of a branch plant mentality that displays a lack of confidence in both courts and legislatures and downplays the ability of Canadian governments to respond to constitutional decisions. The genius of the Canadian constitution in reconciling rights and democracy has been better appreciated abroad than at home.

Only after examining the judicial activism debate on both sides of the border will I attempt in the third chapter to define judicial activism. When used as anything but a quick label, the term judicial activism is slippery and frustrating. Many commentators never bother to define the term and use it as an epithet to clothe their disagreement about particular Court decisions in the guise of larger issues. Although many never bother to articulate and defend their assumptions, those on both the right and left who cry judicial activism often operate on particular and controversial views about democracy. When judges strike down legislation that may have been enacted some years ago, do they really set themselves against the democratic will? What about when they invalidate the actions of officials such as the police? Is the democratic will simply a matter of what the majority wants? Critics of judicial activism often also make particular and controversial assumptions about judging. Can judges really decide difficult cases by looking at the literal words or the original intent of broadly worded bills of rights? Whose intent counts? If there is so some judicial creativity and some judicial law-making, does this really give judge a blank cheque to write their world view into the Charter?

In this chapter, I will outline the three main strands in most discussions of judicial activism and their implicit assumptions. The first strand is that judges engage in judicial activism when they make rather than apply the law. This idea is most evident when those who are rather unsophisticated in the ways of adjudication discuss judicial activism, but it is also found in academic commentary. The left tends to stress the indeterminacy of text and adjudication while the right stresses the court's inability to follow the clear intent of the framers. The second strand is that judges engage in judicial activism when they give the rights of individuals and groups primacy over concerns

about the public good. Critics of judicial activism on the left tend to be concerned about courts using individual rights as trumps while those on the right tend to be concerned about group rights. Both critiques, however, are premised on the assumption that courts will apply rights as trumps without adequately balancing them with competing social interests. The obvious problem here is that two third of Charter cases fail as judges either reject rights claims or find them to be subject to reasonable limitations in legislation. The third element of judicial activism is the idea that when judges displace policies established by legislatures and the executive, they have the final word. Both left and right critics of judicial activism tend to operate on idealistic assumptions about the way that legislatures and executives represent the democratic will. They also both focus on the judicial decision as the final word while discounting the ability of legislatures to modify or override judicial decisions. The three strands of judicial activism – judges making law, judges giving rights primacy and judges having the final word – will then provide the organizing framework for the second part of the book.

The second part of the book will address the extent of judicial activism in Canada. Chapter four will examine the extent to which judges are free to make law by examining those cases in which the Court has been most frequently criticized for making rather than applying the law. These cases include those rejecting the idea that the guarantees of fundamental justice were limited to procedural protections, those recognizing the equality rights of gays and lesbians, those articulating a robust rule for the exclusion of unconstitutionally obtained conscriptive evidence and those articulating a process for determining judicial salaries as an outgrowth of the guarantee of judicial independence. I will also examine the limits that the Court has placed on the recognition of some Charter

rights, most notably equality and social and economic rights. My conclusion will be that judges exercise a constrained creativity when interpreting rights Charter and Aboriginal rights. Judges can and must make some law, but that does not mean that they can make any law they wish.

Chapter five will examine the extent to which judges give rights primacy over competing rights and social interests. I will examine the Sunday shopping issue as a case study of when courts will and will not accept social interests as a justification for infringing the rights of minorities. I will also trace the evolution of s.1 of the Charter as the Court responded to the left critique of judicial activism and recognized that the vindication of rights was not a costless exercise and that the legislature should be entitled to a greater margin of deference in cases involving competing rights and interests and the distribution of scarce resources. It will be seen that this judicial concern with balancing competing rights and social interests has been extended into the heart of the Charter, namely those cases in which accused seek to challenge the activities of a state that seeks to punish and imprison them. This chapter will also explore the real danger that the legislature will not reform laws that have been found to be "Charter proof" by being unsuccessfully challenged in court. Indeed, this may be the greatest danger of judicial review. This chapter will also examine the way that courts have placed robust limitations on Aboriginal and treaty rights. In contrast to the arguments made by critics of judicial activism on the right, I will argue that the Court has not been overly generous with respect to Aboriginal and treaty rights and has created a power to limit those rights without a strong basis in the text of the Constitution or the treaties. The Court has placed both significant internal limitations on Aboriginal rights especially with respect to

commercial and self-government rights and has allowed governments increased latitude to limit limited Aboriginal rights in the name of a broad range of social interests.

Chapter six will focus on the minority of cases in which the Court finds there to be an unjustified violation of the Charter and examine the extent to which judges have the final word on these matters. I will argue that these decisions result in a dialogue between courts, legislatures and society and not a judicial monologue. I will examine some notable examples of dialogue between the Court and the legislature about the extent to which rights will be recognized and balanced with other rights and social goods with respect to tobacco advertising, prisoner voting rights, search and seizure powers, sexual assault laws and the recognition of the equal rights of gays and lesbians. Legislatures have been able to respond to all of these decisions and sometimes they have even reversed these decisions. Unlike in the United States where a judicial decision interpreting the constitution can only be reversed by a constitutional amendment or a change in the Court, judicial decisions can be reversed in Canada. If anything, it is too easy to reverse judicial decisions and I believe that the legislature should invoke the s.33 override and its special safeguards which ensures continued dialogue when the dialogue has become a shouting match about whether a particular judicial decision was right or wrong. I will also argue that even in cases such as *Morgentaler* and *Vriend* in which the Court appears to have the final, governments could have acted had they believed there was enough support for a legislative reply. Even the Court's remedies in individual cases, including the controversial remedy of reading in words as in *Vriend* are not necessarily the final word in the matters subject to litigation. The greatest danger of judges having the final word over the face of strong democratic objections may not in the minority of

cases in which it strikes down state action, but in the majority cases in which it upholds state action. Legislation that has been held by the courts to be "Charter-proof" may be neglected as a candidate for much needed legislative reform.

The third part of the book will attempt to move beyond the debate about judicial activism by critically examining the assumptions of those who criticize the Court for engaging in judicial activism and those who defend the Court on the basis that it reaches or could reach right answers contemplated by the Constitution. I will attempt to situate the Court's decisions in the context of our common law traditions and provide some guidelines for how the ongoing dialogue between courts, legislatures and society about the recognition and limitation of rights should be conducted. Before this reconceptualization can take place, however, it will be necessary to clear the path by dispelling some myths that both sides of the judicial activism debate deploy.

In chapter seven, I will focus on the critics of judicial activism and identify three overstated claims or myths[18] upon which they rely. The first is the idea that judges have open-ended law making powers when interpreting the Charter or Aboriginal rights. To be sure judges do have considerable creativity, as under the common law, but the creativity is constrained by text, precedents, the discipline of the case and other legal traditions. The second myth is that judges vindicate rights at all costs and are not sensitive to competing rights and social interests. By placing internal limitations on rights and by accepting a very wide range of external justifications for their infringement, judges are able, as under

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[18] Chief Justice McLachlin has identified some similar myths under the Charter. They are 1) the myth that the Charter for the first time bestowed individual rights on Canadians 2) that it created absolute rights that the legislature cannot abridge 3) that it replaced Parliamentary supremacy with legislative supremacy 4) that judges can decline to decide Charter issues 5) that criminals 'walk' under the Charter and 6) that the courts and legislatures are adversaries. "Hon. Beverly McLachlin "Charter Myths" (1999) 33 U.B.C.Law Rev. 23.

the common law, to recognize and balance competing rights and interests. When the judges make a mistake, the legislature, as under the common law, retains the option of reformulating its justification for limiting rights or even in most cases of overriding the right. The final myth is that the Charter has changed a system of legislative supremacy to one based on judicial supremacy in which judges have the last and final word about rights in our democracy. The Court sometimes speaks in final and authoritative terms when it delivers a judgment, but care must be taken not to confuse the form of the judgment with its long term impact on the polity. Once the longer view is taken, it is clear that the Charter contemplates an ongoing dialogue between courts and legislatures by giving legislatures many opportunities to respond to judicial decisions, sometimes pre-empting the Court's remedy in the individual case. In most cases, legislatures will reformulate their responses to take into account concerns expressed by the Court, but even in the short history of the Charter, there are significant examples of direct repudiation of Charter decisions by what has come to be known as "in your face" replies to the Court many of which do not rely on the s.33 override. Once these three myths about judicial activism are recognized and rejected, much of the stuffing is knocked out of those who criticize the Supreme Court for engaging in judicial activism or who fear that the unelected and independent judges will have too much power in our democracy.

In chapter eight, I will turn to the claims that have been made by those who have tried to defend American and Canadian courts from claims of judicial activism and the usurping of democracy. Most of this work has been directed towards producing theories of judicial review which attempt to define a role for the courts as consistent with democracy and as capable of finding right answers to the difficult questions courts must

answer in constitutional cases. Most of these theories were developed in the context of the American constitution and fit awkwardly into the structure of the Canadian constitution. A further weakness or myth behind all of these conventional theories is that there is a right answer approach that can gain consensual support and can be implemented by judges. The first conventional theory urges judges to discover and follow the intent of the framers of the Constitution. Although this theory has had fairly little play in Canada, it has been very important over the last two decades in the United States. I will argue that attempts to restrain judges by the framers' intent and the imputed democratic legitimacy of such intent cannot protect courts from charges of engaging in judicial activism. The second conventional theory following the work of Ronald Dworkin is one that urges judges to interpret the general phrases of the Constitution and seek out right answers to the broad moral principles implicit in that document. Canadian variations of the Dworkian approach may focus on rights or section 1, but are united in their insistence that there are determinate principle that should be used by the courts to decide when to invalidate laws under the Charter. I will suggest that these approaches also do not protect courts from charges that they are engaging in judicially activism or that they make mistakes which will require legislative correction. The third conventional theory drawn from the work of John Hart Ely attempts to reconcile judicial review with democracy by suggesting that judges should only enforce the ground rules of democracy. The problem here is that there is no consensus about what are the ground rules of democracy. The indeterminacy of this theory of judicial review again suggests that judges who employ it are still vulnerable to charges of judicial activism and of having made serious mistakes which require legislative correction.

It is not enough to tear down the arguments of those who criticize the court for engaging in judicial activism and those who seek to defend it from such criticisms. It is still necessary to attempt to outline a new role for the courts. A new approach to judicial review should attempt not to rely on the myths employed by either critics or defenders of judicial activism. Such a new theory will also have to acknowledge that defenders of judicial review have not yet constructed a theory which perfectly constrains judges or prevents them from making mistakes. At the same time, the new theory will have to acknowledge that the critics of judicial activism have not made their case that judges have no constraints when making law, that they are only concerned with maximizing rights and that they have the last word in articulating the meaning of rights. Any new theory of judicial review which is built on the ashes of the judicial activism debate will have to comprehend the reality of both judicial power and fallibility.

In the final chapter, I will suggest that we should understand the Charter not as "the revolution" that many Charter critics and defenders believe it be, but rather as a continuation and enrichment of our common law traditions in which the courts conducted a dialogue with legislatures and society about important values and processes, but were not guaranteed the final word in the dialogue. Under the common law, judges exercised limited creativity to recognize and proclaim values such as the importance of fair treatment in administrative law, subjective fault in criminal law and legal authority for coercive powers and, too infrequently, the honour of the Crown in its dealings with First Nations. Nevertheless, the courts realized that it was always open to legislatures to trim or even override these values by clear legislative statements that departed from the values of the common law constitution. The Charter has altered the dialogue somewhat by

giving courts a constitutional text that recognizes rights and by requiring legislatures not only to prescribe limits on those rights by law, but also to justify them as a reasonable limits on rights in a free and democratic society or else to alert the world by employing the s.33 override which will expire in five years time. Nevertheless, for better or worse, the dialogue between courts and legislatures conducted under the common law continues under the Charter.

Talk of dialogue between the Court and the legislatures is au courant. The Court itself has described its relationship with the legislature as one based on a dialogue which allows the legislative product to be reviewed by the courts and the work of the courts to be reviewed by the legislatures "in the passing of new legislation (or even overarching laws under s.33 of the Charter. This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it."[19] Talk of dialogue is becoming something of a cliché which is unfortunate because it obscures the truth that lies behind the cliché and the serious implications of seeing judicial review as a dialogue between courts and legislatures. Dialogic theories of judicial review suggest that the judicial role in protecting rights is more modest and dependent on other branches of government and society than conventional rights based theories. Dialogic theories of judicial review can soothe the democrat and those wary of courts by suggesting how judicial "mistakes" may be corrected by legislatures. At the same time, they make minorities and the unpopular anxious by revealing how judicial "triumphs" can be frustrated by resistance from legislatures, administrators and society. Giving the legislatures the power to correct judicial mistakes like *Lochner* also gives them the power

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[19] *Vriend v. Alberta* [1998] 1 S.C.R. 493 at para 139. See also *R. v. Mills* (1999) 139 C.C.C.(3d) 321 at para 57 (S.C.C.).

to resist judicial triumphs such as *Brown v. Board of Education.* My conclusion that judicial review in Canada is a continuation of a common law dialogue between courts and legislatures should cool out those who would criticize the courts for excessive activism in protecting rights, but it has disquieting implications for those who look to the courts for protection. Dialogic theories make room for strong and principled judicial decisions that remind us of the importance of fundamental values and procedures and the rights of minorities and the unpopular, but offer no guarantees that the judicial decisions will prevail. This is the price that must be paid for the fallibility of courts. The structure of the Charter, as well as the temper of our post modern world, suggests that there are no guarantees. The Charter and the courts cannot save us or destroy us. That power is rightly and inevitably in our hands. Dialogic judicial review can, however, make us and future generations more aware of what has been done in our name.

To counter the risk of talk of dialogue becoming a cliché, I will also attempt in the last chapter to outline several different theories of dialogue and suggest why one type of theory in particular is superior. I will argue that we should not accept strong theories of dialogue which would routinely give the legislature a right to assert its own interpretation of the Charter over that of the Court or those which would suggest that the Court's interpretation of the Constitution can be reversed by legislation that has greater legitimacy because it is enacted by the more majoritarian branch of government. Both these theories of dialogue would require the court and the legislature to do the same thing whether that be interpreting the Constitution or reflecting majority sentiment. They would both also encourage routine show downs between courts and legislatures by suggesting

that the legislature can enact an "in your face" reply to a court decision without the special safeguards and sober second thoughts of the s.33 override.

The best dialogues are not those between people who attempt to say or do the same thing or between people who are in each other's face over whether they are right or wrong about a particular point, but rather between people who enrich and expand the conversation by making their interlocutor think about matters that they would not normally have considered. This suggests that the best theory of dialogue between courts and legislatures is one which gives them distinct and complementary roles that are loyal to their own particular concerns and experiences. Section one of the Charter contemplates a dialogue in which courts focus on issues of principle such as the effects of state action on fundamental freedoms, fairness and the rights of minorities while legislatures clarify and refine the reasons why they act and the alternatives that they have considered. The result can be a democratic dialogue that enhances and enriches democracy by allowing courts and legislatures to speak in their distinct and complementary voices. This, indeed, explains most of our experience under the Charter. When, however, voices become raised and disagreement becomes stuck on a particularly thorny point, then the dialogue should be conducted with the special care required by the override. This will ensure that all are alerted and that the dialogue will continue.